92-1133

No. _____

Supreme Court, U.S.
FILED
DEC 22 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

GAIL LIGHTFOOT, STEVE ALEXANDER, PAT McHARGUE, ERIC GARRIS, ANN JUSTI, GEORGE O'BRIEN, WAYNE NYGREN, RONALD RUBIDOUX, AND LIBERTARIAN PARTY OF CALIFORNIA,

Petitioners,

v.

MARCH FONG EU, Secretary of State of California,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

ARLO HALE SMITH
251 Kearny St., #602
San Francisco, CA 94108
(415) 788-5297

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether small ballot-qualified political parties have a constitutional right under the First and Fourteenth Amendments to decide to nominate candidates by party convention, rather than by closed primary?

2. Whether state laws that have the effect of preventing a small, ballot-qualified party from nominating a non-member as its candidate, are inconsistent with party members' rights of association guaranteed by the First and Fourteenth Amendments, especially when the state permits large political parties to nominate nonmembers?

TABLE OF CONTENTS

Page

QUESTION PRESENTED 1

OPINIONS BELOW 1

JURISDICTION OF THE SUPREME COURT 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 3

I. CONVENTION NOMINATIONS (Bylaw 17) 3

II. NOMINATION AT THE PRIMARY BY WRITE-IN VOTE (Bylaw 15) 5

REASONS FOR GRANTING THE WRIT 7

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE THE IMPORTANT QUESTION OF WHETHER SMALL PARTIES THAT ARE BALLOT-QUALIFIED HAVE A CONSTITUTIONAL RIGHT TO NOMINATE CANDIDATES AT PARTY CONVENTION, RATHER THAN CLOSED PRIMARY 7

II. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE THE IMPORTANT QUESTION OF WHETHER A BALLOT-QUALIFIED PARTY'S CONSTITUTIONAL RIGHT TO SELF-GOVERNANCE INCLUDES THE RIGHT TO FILL NOMINATIONS LEFT VACANT AT OR BECOMING VACANT AFTER A PRIMARY ELECTION 10

III. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT HAS IGNORED THIS COURT'S HOLDING IN *TASHJIAN* BY VALIDATING AN ELECTORAL SCHEME THAT PROHIBITS THE LIBERTARIAN PARTY FROM NOMINATING A NON-MEMBER 13

TABLE OF CONTENTS – Continued

Page

IV. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN *ANDERSON* AND *DEMOCRATIC PARTY v WISCONSIN* THAT LAWS WHICH DISCRIMINATE AGAINST NEW AND SMALL PARTIES ARE SUSPECT, AND PARTIES HAVE A CONSTITUTIONAL RIGHT TO HOLD "CLOSED" PRIMARY ELECTIONS 15

CONCLUSION 18

APPENDIX 1a

TABLE OF AUTHORITIES

Page

CASES:

Anderson v. Celebrezze, 460 U.S. 780 (1983) 15

Burdick v. Takushi, ___ U.S. ___, 112 S.Ct. 1066 (1992) 18

Democratic Party v. Wisconsin, 450 U.S. 107 (1981) 8, 9, 10, 13, 15

Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989) 7, 8

Hopfmann v. Connolly, 746 F.2d 97 (1984), 471 U.S. 459 (1985), 769 F.2d 24 (1985), cert. denied, 479 U.S. 1023 (1987) 8, 13

Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) 17

Jenness v. Fortson, 403 U.S. 431 (1971) 9

Lightfoot v. Eu, 964 F.2d 865 (1992) ..... *passim*

Munro v. Socialist Workers Party, 479 U.S. 189 (1986) 17

Norman v. Reed, 502 U.S. ___, 112 S.Ct. 698 (1992) 17

Opinion of the Justices, 385 Mass. 1201, 434 N.E. 2d 960 (1982) 8, 9, 13

Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986) 7, 8, 11, 13, 14, 15

Williams v. Rhodes, 393 U.S. 23 (1968) 9, 11

TABLE OF AUTHORITIES

Page

CONSTITUTIONAL AND STATUTORY PROVISIONS:

United States Constitution, First Amendment.... *passim*

United States Constitution, Fourteenth Amendment..... *passim*

California Constitution, Article II, sec. 4 12

California Constitution, Article VII, sec. 8..... 12

28 U.S.C. 1254..... 2

California Elections Code sections:

54.....2, 16

707..... 12

707.5 12

707.6 12

707.7 12

708..... 12

6401.....2, 14

6490..... 12

6495..... 2

6651.5 .....2, 11

6653.....2, 11

6654.....2, 11

6657.....2, 11

TABLE OF AUTHORITIES – Continued

Page

6661(a) 2, 7, 14, 16, 18

7300(b) 2, 17

17102 2

25500 12

OTHER AUTHORITIES:

35 Op. Cal. Att. Gen. 206 14

59 Op. Cal. Att. Gen. 414 14

National Municipal League, A Model Direct Primary System (1951) 10

No. _____

In The

Supreme Court of the United States

October Term, 1992

GAIL LIGHTFOOT, STEVE ALEXANDER, PAT McHARGUE, ERIC GARRIS, ANN JUSTI, GEORGE O'BRIEN, WAYNE NYGREN, RONALD RUBIDOUX, AND LIBERTARIAN PARTY OF CALIFORNIA,

Petitioners,

v.

MARCH FONG EU, Secretary of State of California,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari be issued to review the judgment and the opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding.

OPINIONS BELOW

The opinion of the District Court (Appendix, A, *infra*) is not reported. The original opinion of the Court of Appeals (Appendix B, *infra*) is not reported. The

amended opinion of the Court of Appeals (Appendix C, *infra*) is not reported. The amended opinion of the Court of Appeals (Appendix C, *infra*) is reported at 964 F.2d 865 (9th Cir. 1992).

JURISDICTION OF THE SUPREME COURT

The judgment of the Court of Appeals (Appendix B, *infra*) was originally filed May 18, 1992. Appellants petitioned for rehearing and rehearing en banc on June 1, 1992. The decision was reissued with a modification on July 7, 1992 (Appendix C, *infra*). Appellants then repetitioned for rehearing and rehearing en banc on July 15, 1992. Rehearing and rehearing en banc were denied on September 23, 1992 (Appendix D, *infra*). This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment I of the U.S. Constitution, Amendment XIV of the U.S. Constitution, and California Elections Code sections 54, 6401, 6495, 6651.5, 6653, 6654, 6657, 6661, 7300, and 17102, are reproduced at Appendix E, *infra*.

STATEMENT OF THE CASE

I. Convention nominations (Party Bylaw 17)

The Libertarian Party was organized in 1972. Since, initially, it was not a "qualified" political party in California, it placed its candidates on the California general election ballot under the "Independent candidate" procedure, by petition. Such candidates could only be labelled on the November ballot as "Independent". Party nominees during this period were chosen by party convention.

In 1980, the Libertarian Party became a qualified political party in California, entitled to nominate candidates by closed primary, for all partisan offices. The party gained this status by persuading a number of voters, equal to 1% of the last gubernatorial vote, to list themselves as party members on voter registration forms. The party retains this status as long as it continues to poll at least 2% of the statewide vote, in gubernatorial election years. Under state law, as a "qualified" political party, it could only choose its nominees by closed, direct primary; it could no longer nominate by convention.

After several years of experience, the party came to believe that nomination by convention is more democratic and produces better decisions, than nomination by closed primary. The party's primary voters are not well informed about the candidates in the party's primary, since the mass media don't cover small party primary contests in California, and since the California Voter's Handbook does not include information about partisan candidates.

The party also became aware that the cost to the taxpayers for the Libertarian Party's primary exceeds $1,000,000 per election year, and since the party is opposed to government subsidy of all kinds, decided that it no longer wished to be the recipient of a publicly-supported nominations process. In 1987, the party, in cooperation with the County Clerks Association, sponsored a bill to permit small, qualified parties to decide for themselves whether to nominate by primary or convention. The bill, AB 2570, passed the Assembly but not the State Senate. Efforts to have a similar bill introduced in the legislature since then have failed.

In 1990, the party changed its Bylaws to provide for nomination by convention, but only in instances at which no one had won the party's nomination by primary, for that particular office. Bylaw 17, covering nomination by convention, is set forth in Appendix F. The Bylaw provides only for convention nomination in instances at which no one has been nominated at the primary, as an experiment. It was believed that the return to convention nominations would be successful, but to forestall any alarm that the change had undemocratic motivations, it was limited to those instances at which no one had entered the party's primary. Obviously, in such instances, no one could fear that the will of the rank-and-file primary voters was being thwarted. It is very easy for an individual member of the Libertarian Party to enter the party's primary; state law only requires 65 signatures for statewide office, or 40 signatures for district office.

Soon after the 1990 primary, the party nominated several candidates for Congressional and state office by convention, in accordance with its own Bylaws. When the

Secretary of State stated that she would not print their names on the November ballot, this lawsuit was filed. On October 16, 1990, the district court entered judgment for defendants, after granting defendants' motion to dismiss and/or for summary judgment, and denying plaintiffs' motion for summary judgment. Plaintiffs appealed. The Court of Appeals affirmed the district court judgment.

II. Nomination at the primary by Write-In Vote (Bylaw 15)

The Libertarian Party also adopted Bylaw 15, to alter its own primary nomination process. If Bylaw 17 had been recognized by the state, the party would not have had any interest in altering its own primary procedures. Bylaw 15 was adopted because the party was aware that its attempt to implement Bylaw 17 might not be successful. Bylaw 15 is set forth in Appendix G.

Write-in nominations at the primary have special legal significance in California. Under California law, the only method for a political party to nominate a non-member, is by write-ins at the party's primary. Since 1959, California law has not permitted anyone to place his or her name on the primary ballot of a party, unless that candidate is a member of the party. But, both before and since 1959, anyone may be a write-in candidate in any party's primary.

This write-in option also makes it possible for someone to be nominated by more than one party. Someone who is nominated by two parties, is listed only once on the general election ballot, but the names of both parties

follow the candidate's name, e.g., "John Jones, Republican, Democrat".

Thus, the Libertarian Party, and all qualified parties in California, have a special interest in write-in voting at the primary. However, Election Code sec. 6661(a) provides that no one may be nominated by write-in votes at a partisan primary, unless he or she receives a number of votes equal to 1% of the vote cast for that office at the last *general* election. There aren't enough registered Libertarian primary voters in any congressional or legislative district in the state, to meet this standard. By contrast, in a typical district, a Democratic write-in candidate can be nominated if 2% of the registered Democrats cast a write-in vote for him or her.

The Libertarian Party's Bylaw 15 provides that a write-in candidate at the party's primary is deemed nominated if he or she outpolls all opponents, *and* receives write-in votes equal to the number of signatures that would have been required to win a spot on the primary ballot. Since California law also provides that no one may have his or her write-in votes counted, unless the candidate files a petition signed by that same number of voters, all voters have advance notice prior to the primary of what their choices are. No one may compete for a write-in nomination who does not enjoy some advance support.

At the June 1990 primary, one Libertarian write-in candidate, Eric Garris, did comply with Bylaw 15. As a candidate for the Libertarian nomination for Assemblyman, 21st district, he polled 89 write-ins, defeating a

write-in opponent who received 38 votes. Garris simultaneously won the Republican nomination for the same office, and if Bylaw 15 had been followed, he would have been listed on the November ballot as "Republican, Libertarian". However, because the Secretary of State refused to recognize the validity of Bylaw 15, and because Garris did not receive 1,154 write-ins at the Libertarian primary (the number required by sec. 6661a), he was only listed in November as "Republican".

On October 16, the district court upheld the constitutionality of sec. 6661a, and the Court of Appeals affirmed the district court.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE THE IMPORTANT QUESTION OF WHETHER SMALL PARTIES THAT ARE BALLOT-QUALIFIED HAVE A CONSTITUTIONAL RIGHT TO NOMINATE CANDIDATES AT PARTY CONVENTION, RATHER THAN CLOSED PRIMARY

In *Eu v. San Francisco County Democratic Central Committee* (1989), 489 U.S. 214 and *Tashjian v. Republican Party of Connecticut* (1986), 479 U.S. 208, this Court explicitly recognized that the freedom of association guaranteed ballot-qualified political parties and their members under the First and Fourteenth Amendments encompass a constitutional right of self-governance. This right of self-governance encompasses "a right . . . to select a 'standard bearer who best represents the parties' ideologies and preferences.' . . . " *Eu v. San Francisco County Democratic Central Committee* (1989), 489 U.S. 214 (109 S.Ct. 1013,

1020-1021). State laws which "prevent the parties from taking internal steps affecting their own process for the selection of candidates" (*Tashjian, supra,* 479 U.S. at p. 224) "can survive constitutional scrutiny only if the State shows that it advances a compelling state interest . . . and is narrowly tailored to serve that interest" (*Eu, supra,* 109 S.Ct. at pp. 1019-1020).

Does this constitutional right at self-governance permit ballot-qualified political parties with few members to choose to nominate candidates for partisan office by party convention rather than by state-sponsored primary elections?

Although this court has never directly ruled on the question, its past decisions – as well as the vast majority of decisions of the lower courts – suggest that the answer is "Yes".

In *Democratic Party v. Wisconsin* (1981), 450 U.S. 107, this Court permitted a major party – the Democratic Party – to ignore the results of a state-sponsored primary election and to select delegates for a presidential nominating convention by party convention.

In *Opinion of the Justices* (1982), 385 Mass. 1201 (434 N.E. 2d 960) and *Hopfman v. Connolly* (1st Cir., 1984), 746 F.2d 97, 102, both the state and lower federal courts permitted the Massachusetts Democratic Party to partially supplant a state-sponsored primary by party rule requiring any candidate who was to appear on the primary ballot to first receive 15% of the vote at a state party convention.

In *Jenness v. Fortson* (1971), 403 U.S. 431, 438, this Court ruled that one of the reasons it had invalidated the Ohio electoral scheme in *Williams v. Rhodes* (1968), 393 U.S. 23, was Ohio's insistence that a "small or new" party "establish () elaborate primary election machinery", rather than allowing such a party to nominate by convention.

The lower courts' holdings in this case that a small party has no constitutional right to choose to nominate candidates by convention runs counter to the foregoing pronouncements of this Court and other lower courts.

The Ninth Circuit's conclusion that a state interest in enhancing the democratic character of the electoral process is sufficient to support mandatory primary elections for small parties, would appear to be in conflict with *Democratic Party v. Wisconsin, Opinion of the Justices,* and *Hopfman,* since any state interest would surely be stronger in the case of the Democratic Party than a small party, yet the party's right of self-governance was held to override state primary election laws in these cases.

Moreover, the Ninth Circuit's decision in this case ignores uncontroverted evidence in the record to the effect that for parties other than the Democrats and Republicans, primary elections poorly serve any state interest in voter participation or democratic election procedures, since primary contests for such parties receive virtually no media coverage, making it difficult for the candidates and party to transmit information about candidates to party members. Fay Declaration, Excerpts, 93-96; Smith Declaration, Excerpts, 97-98. The decision also ignored evidence that the National Municipal

League's *A Model Direct Primary System*, written in 1951, had recommended that only large parties nominate by primary. The decision didn't acknowledge the evidence that the election laws of 43 states permit at least some candidates of small parties to appear on the general election ballot, with the party label, even though no primary was held for such parties.

Such evidence in the record casts doubt on whether the State has any legitimate interest at all in requiring small parties to nominate by closed primary.

In view of the importance of the question whether – after *Tashjian* and its progeny – small political parties have a constitutional right to choose nominees by party convention, rather than state-sponsored primary elections, and the inconsistency of the reasoning of the Ninth Circuit in this case with *Democratic Party v. Wisconsin* and other decisions permitting a major party to wholly or partially supplant state-sponsored primaries with party conventions, this Court should grant certiorari.

II. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE THE IMPORTANT QUESTION OF WHETHER A BALLOT-QUALIFIED PARTY'S CONSTITUTIONAL RIGHT TO SELF-GOVERNANCE INCLUDES THE RIGHT TO FILL NOMINATIONS LEFT VACANT AT OR BECOMING VACANT AFTER A PRIMARY ELECTION

Regardless of whether the Constitution guarantees to small parties the right to decide to select nominees by party convention, this case also presents the narrow question (largely ignored by the lower courts) of whether political parties constitutional right of self-governance

embraces the right to fill nominations which are left vacant at or become vacant after a primary election.

Under *Tashjian, supra,* and *Eu, supra,* a law barring parties from filling vacant nominations is subject to strict constitutional scrutiny as a restriction that "prevent(s) . . . parties from taking internal steps affecting their own process for the selection of candidates." *Tashjian, supra,* 479 U.S. at p. 224.

In this case, the lower courts failed to apply the appropriate level of constitutional scrutiny to California's ban on qualified parties filling vacancies in nominations that occur for reasons other than death of a nominee. California Election Code sections 6651.5, 6653, 6654, and 6657.

California's restrictions on filling vacant nominations strike at the heart of a qualified party's associational rights since they prevent that party from fielding any candidate in the general election if no nomination is made at the primary, or a nomination made becomes vacant due to causes other than the nominee's death. "The right to form a political party means little if a party can be kept off the ballot and thus denied an equal opportunity to win votes." *Williams, supra,* 393 U.S. at p. 31.

Moreover, by barring post-primary action by the party to fill most vacant nominations, the challenged laws sharply limit the ability of parties and their members to respond to unexpected political developments and changed conditions. For example, if no candidate filed to appear on the primary ballot because the incumbent

appeared invulnerable, and the incumbent was subsequently indicted or otherwise entangled in a scandal, the party would be unable to field a candidate to meet such opportunity. Similarly, if a person who wins the primary should become ineligible to vote or run for office due to adjudication of mental incompetency or conviction of a felony (see, e.g., California Constitution Article II, section 4, Article VII, section 8; California Election Code sections 707, 707.5, 707.6, 707.7, 708), the party is legally disqualified from substituting a new nominee.

Such limitation on the party's ability to meet changing conditions can be severe indeed, since California's deadline for filing papers to gain a place on the primary ballot are in February and March (Cal. Election Code sections 6490 and 25500) – more than eight months before the general election!

The Ninth Circuit's claim that the challenged ban on filing vacant nominations serves a state interest in enhancing the democratic character of the election process could scarcely be less convincing.

Even if such "interest" could support the State's decision to require a party to hold a primary election in the first place (which petitioners dispute, at least in the case of small parties), it certainly provides no support for the State's action in precluding the party from filling vacancies in nominations which exist or occur after the voters have had a chance to nominate candidates through the primary election.

The reasoning and results of the Ninth Circuit decision on this point are irreconcilable with decisions permitting ballot-qualified parties to wholly or partially

supplant state-sponsored primaries with party conventions. *Democratic Party, supra,* 450 U.S. 107; *Opinion of the Justices, supra,* 434 N.E. 2d 960; *Hopfman, supra,* 746 F.2d 97, 102. If a party has the right to refuse to recognize the results of a state-sponsored presidential primary and instead select presidential delegates by convention (Democratic Party, *supra*) or to refuse to permit a candidate who obtains the signatures required by state law to appear on a primary ballot unless he or she obtains 15% support at a party convention (*Opinion of the Justices, supra; Hopfman, supra*), how can a party be denied the right to fill vacancies in party nominations that exist or occur after the primary?

III. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE NINTH CIRCUIT HAS IGNORED THIS COURT'S HOLDING IN *TASHJIAN* BY VALIDATING AN ELECTORAL SCHEME THAT PROHIBITS THE LIBERTARIAN PARTY FROM EVER NOMINATING A NON-MEMBER.

In *Tashjian, supra,* 479 U.S. at 215, this Court said: "/w/ere the State to . . . provide that only party members might be selected as the Party's chosen nominees for public office, such a prohibition of potential association with nonmenbers would clearly infringe upon the rights of the Party's members under the First Amendment to organize with like-minded citizens for support of common political goals."

The Ninth Circuit disregarded said holding in this case by upholding an electoral scheme that renders it

impossible for the Libertarian Party to nominate non-members, even though the Democratic and Republican Parties may freely do so.

Because California will not allow a non-member to appear on a party's primary ballot (California Election Code section 6401(a)), such a candidate can be nominated only by write-in votes. See 59 Op. Cal. Att. Gen. 414 (1976), 35 Op. Cal. Att. Gen. 206 (1960).

However, California Elections Code section 6661(a) – which the Ninth Circuit upheld – prohibits any nomination at the primary from being made unless the candidate receives a total number of write-in votes equal to 1% of all votes cast in the last general election for that office. This number is higher than the total number of registered Libertarian Party voters eligible to vote in the primary in every congressional and legislative district in California.

Since the effect of Election Code Section 6661(a) is to "provide that only party members might be selected as the Party's chosen nominees for public office, such a prohibition of potential association with nonmembers . . . clearly infringe/s/ upon the rights of the Party's members under the First Amendment to organize with like-minded citizens in support of common political goals" (*Tashjian, supra,* 479 U.S. at p. 215).

This Court should grant certiorari to eliminate the conflict between the Ninth Circuit's decision in this case and this Court's holding in *Tashjian*.

IV. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE DECISION BELOW CONFLICTS WITH THIS COURT'S HOLDING IN *ANDERSON* AND *DEMOCRATIC PARTY v. WISCONSIN* THAT LAWS WHICH DISCRIMINATE AGAINST NEW AND SMALL PARTIES ARE SUSPECT, AND PARTIES HAVE A CONSTITUTIONAL RIGHT TO HOLD "CLOSED" PRIMARY ELECTIONS

This Court held in *Anderson v. Celebrezze* (1983), 460 U.S. 780, "A burden that falls unequally on new or small political parties" is inconsistent with the First Amendment because "/i/t discriminates against those candidates and – of particular importance – against those voters whose political preferences lie outside the existing parties . . . . By limiting the opportunities of independent-minded voters to associate in the political arena to enhance their political effectiveness as a group, such restrictions threaten to reduce diversity and competition in the marketplace of ideas." *Anderson, supra,* 460 U.S. at pp. 793-794.

It is also beyond dispute that a ballot-qualified party has the right to insist that only members who have affiliated themselves with the party by registering as party members may participate in selecting party nominees, i.e., that the party has a constitutional right to hold a "closed" primary. *Democratic Party, supra,* 450 U.S. 107 (invalidating state law requiring party to abide by the results of "open" primary on which nonmembers were permitted to vote); *Tashjian, supra,* 107 S.Ct. at p. 549, fn. 6 (party has constitutional right to insist on excluding nonmembers from its primary).

Here, the Ninth Circuit ignored the foregoing rulings of this Court by upholding Elections Code sec. 6661(a) – a law that unequally burdens new or small parties which exercise their constitutional right to hold "closed" primaries – by setting a numerical minimum for nomination by write-in which the record shows exceeds the total number of Libertarian voters in every congressional and legislative district in California. In contrast, said threshold may frequently be met by Democratic or Republican candidates who need the votes of, typically, 2% of the registered Democratic or Republican voters in those parties' primary elections.

The Ninth Circuit reasoning that the Libertarian Party could mitigate the effect of California Election Code Section 6661(a) by allowing nonmembers to vote in its primary, trivializes the party's constitutional right to hold a "closed" primary.

Moreover, the lower courts ignored just how discriminatory section 6661(a) is:

(1) Section 6661(a) requires *write-in candidates only* to receive 1% of the vote cast for the office at the last general election. Candidates whose names appear on the ballot at the primary election may be nominated by a mere plurality of votes, no matter how few votes that may be. Election Code section 54.

(2) Section 6661(a) requires the 1% minimum only in primary elections. A write-in candidate could be elected to the same office at the general election by a plurality of votes, regardless of how few votes that was. Election Code section 54.

(3) California already requires write-in candidates to submit the same number of signatures as are required to obtain a place on the primary ballot, as a condition of having the write-ins counted. Election Code section 7300(b).

Requiring a write-in candidate to show substantially more support to obtain a primary nomination than is required for a candidate on the ballot for the same office, or even a write-in candidate running for the same office at the general election, serves no state interest.

While the Ninth Circuit cited cases sustaining state laws requiring candidates to submit signatures of 1% of all voters to get on the ballot, or to poll 1% in the primary to get on a general election ballot, it failed to note such laws are non-discriminatory. See *Munro v. Socialist Workers Party* (1986), 479 U.S. 189, in which Washington state required all candidates – whether major or minor party, whether on the ballot or write-in – to poll 1% of the open primary vote.

Such disparate requirements for candidates running for the same office in the same primary election, or the same office in the general election, offend the First and Fourteenth Amendments, since the classifications created by such laws serve no compelling state interest. *Illinois State Board of Elections v. Socialist Workers Party* (1979), 440 U.S. 173 (law imposing higher signature requirement for ballot access in single county of state, than for statewide office, invalid); *Norman v. Reed* (1992), 112 S.Ct. 698 (invalidating interpretation of state law imposing higher signature requirement for ballot access in single county, than for statewide office).

Since California allows write-in votes in all elections (Election Code section 17109), and since California requires write-in candidates to show the same support, via petition, to have their write-ins counted, that it requires for candidates seeking a place on the primary ballot, this Court's holding in *Burdick v. Takushi* (1992), ___ U.S. ___ (112 S.Ct. 1066) that states may ban all write-in votes if ballot access laws are nondiscriminatory, cannot justify California Election Code section 6661(a).

CONCLUSION

For these reasons, it is respectfully requested that a writ of certiorari should issue in this case.

Respectfully submitted,

Arlo Hale Smith
251 Kearny St. #602
San Francisco, CA 94108
(415) 788-5297
Attorney for Petitioners

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GAIL LIGHTFOOT, et al., Plaintiff, v. MARCH FONG EU, Secretary of State of California Defendant.	NO. C90-1750 TEH ORDER (Filed Oct. 16, 1990)

By this action, the Libertarian Party of California, its Chair, and others challenge the constitutionality of two sections of the California Elections Code – §§ 6661(a)[1] and 6653[2].[3] The thrust of the complaint is that the election code fails to allow qualified political parties, such as the Libertarian Party, to nominate candidates for the general

---

[1] § 6661(a) provides that "no person whose name has been written in upon a ballot for an office at the direct primary may have his name placed upon the ballot as a candidate for that office for the ensuing general election unless one of the following statements is true . . . (a) At that direct primary he received for that office votes equal in number to 1 percent of all votes cast for the office at the last preceding general election at which the office was filled."

[2] § 6653 provides that "No vacancy on the ballot for a general election shall be filled except by reason of the death of a candidate occurring at least 59 days before the date or the next ensuing general election."

[3] All future section citations are to the California Elections Code.

ballot by party convention (rather than by primary election). This failure, plaintiffs assert, violates their first and fourteenth amendment rights of "association for the common advancement of political beliefs and ideas." Complaint at ¶ 20. Plaintiffs also contend that the statutory scheme makes it impossible for the Libertarian party to nominate its candidates by "write-in" vote, thus rendering the scheme unconstitutional for the same reason stated above. *Id.* at ¶¶ 24-25.

Plaintiffs now move for summary judgment, while defendant, the Secretary of State of California, moves to dismiss. Having carefully considered the parties' written and oral arguments, the Court denies plaintiffs' motion for summary judgment, and grants defendant's motion to dismiss. Alternatively, summary judgment is granted in favor of defendant on the ground that, taking the facts as plaintiffs present them, defendant is entitled to judgment as a matter of law.

BACKGROUND

California's election code scheme provides two avenues for party candidates to obtain access to the general election ballot. First, candidates of a "qualified party" (which includes the Libertarian Party) may gain access by participating in the primary election. § 6430. Thus, a Libertarian Party candidate need only declare his/her candidacy and file nomination papers with the county clerk 88 days before the primary election to appear on the Libertarian primary ballot. §§ 6490-6491, 6494-5. *Fridley v. Eu*, 131 Cal.App.3d 100, 104, 182 Cal.Rptr. 232, 234 (1982).

All primary winners are subsequently placed on the general ballot, § 6610. Second a party candidate can obtain access to the general ballot by being a write-in candidate. However, to so qualify, the candidate must have received, at that direct primary, votes equal in number to 1 percent of all votes cast for the office at the last preceding general election at which the office was filled. § 6661(a).

Plaintiffs contend that this scheme, and §§ 6661(a) and 6653 in particular, unconstitutionally impedes their access to the November general ballot. First, it does not give them the option of nominating candidates for the general election at their party convention. Second, the write-in provision is too restrictive. The 1 percent vote requirement, they complain, may exceed the total number of registered Libertarian voters in a district, thus making it impossible to meet the 1 percent figure.[4]

Plaintiffs also complain that the statutory scheme interferes with their ability to have their candidates identified as Libertarians on the ballot. Plaintiff Garris, for example, will be on the November ballot as the Republican nominee, having won the Republican primary for the 21st Assembly seat. However, in addition to being identified as the candidate of the Republican Party, plaintiffs want Mr. Garris identified on the general ballot as a candidate of the Libertarian Party as well. He can not be so identified, however, because he did not obtain enough votes to become the Libertarian candidate as a "write-in"

---

[4] For example, plaintiffs state that with respect to the 21st Assembly District seat, 1 percent of the votes cast in the preceding general election equalled 1,154; however, at that time there were only 989 persons registered as Libertarians in the district.

candidate under § 6661(a); nor will the state identify him as a Libertarian based on a party convention nomination.

DISCUSSION

There is "no 'litmus-paper' test . . . for evaluating constitutional challenges to ballot access restrictions." *Erum v. Cayetano,* 881 F.2d 689, 692 (9th Cir. 1989). Rather the court must weigh "(1) the character and magnitude of the asserted injury to first and fourteenth amendment rights that the plaintiff seeks to vindicate; and (2) the precise interests put forward by the State as justifications for the burden imposed by its rule." *Id.*[5]

United States and Supreme Court authority make it clear that the magnitude of the injury asserted here is "slight," given that Libertarian candidates have easy access to the primary ballot, a point plaintiffs do not dispute.[6] *Munro v. Socialist Workers Party,* 479 U.S. 189, 107 S.Ct. 533 (1986); *Erum,* 881 F.2d at 693 (injury is "slight" when a state affords a candidate easy access to the primary election ballot and the opportunity to wage a ballot-connected campaign); *cf., Fridley,* 131 Cal.App.100 (rejecting challenge to § 6661(a) on equal protection and

---

[5] The Court specifically noted, that in *Ballot access* cases, as opposed to cases involving other types of election regulation, a "strict scrutiny" analysis does not apply; rather, the more liberal balancing test quoted above should be used. 881 F.2d at 692, n 7.

[6] For example, plaintiffs McHargue and Rubidoux would only have had to timely declare their candidacy and submit nomination papers with 40 signatures to gain access to the primary ballot. § 6495(b). Plaintiff O'Brien would have needed 65 signatures. § 6495(a).

due process grounds). Further, the precise interests forwarded by the state (avoiding factionalism, winnowing candidates to those demonstrating a modicum of support, and avoiding voter confusion and deception) justify the restrictions on access to the general ballot complained of here. *Munro*, 107 S.Ct. at 537-538[7]; *Storer v. Brown*, 415 U.S. 724, 730-735-736, 94 S.Ct. 1274, 1282 (1974); *Erum*, 881 F.2d at 693.

In sum, the fact that (1) Libertarian candidates may have difficultly meeting the write-in requirements of § 6661, and (2) the Libertarian Party can not nominate by convention, as it would prefer, is not constitutionally significant in light of the easy access Libertarian candidates have to the ballot through the primary process, and the interests forwarded by the State. Plaintiffs' assertedly contrary authorities are largely inapposite.

Plaintiff Garris, as noted above, presents a somewhat different issue. He will be listed on the November ballot as the Republican nominee (having won the Republican primary). He did not win sufficient write-in votes to qualify as a Libertarian candidate on a write-in basis. However, he contends that the Constitution requires that he also be allowed to identify himself as a Libertarian on the general ballot based on the fact that the Libertarian Party nominated him for the office at issue pursuant to its

---

[7] Plaintiffs contend that *Munro* and *Erum* are distinguishable because the election schemes at issue in those cases allowed "cross-voting" in the primary. This statement is incorrect with respect to the Hawaii scheme at issue in *Erum*. *See* 861 F.2d at 690-91. Moreover, the Ninth Circuit specifically rejected the "cross-voting" distinction as insignificant. *Id.* at 693.

bylaws. The case authorities cited by plaintiffs do not support Garris' position.

Because California prohibits cross-filing at the primary level, Garris was required to choose between the participating in the primary election as a Republican or Libertarian candidate. Such a cross-filing restriction was implicitly upheld by the Supreme Court in *Storer, supra.* Taking this factor together with the authorities discussed above, and the fact that the Libertarian Party is free to endorse Mr. Garris, and Mr. Garris is free to publicly embrace the principles of the Libertarian Party, we conclude that neither Mr. Garris nor the Libertarian Party can demonstrate a violation of their first amendment associational rights based on the state's refusal to identify Mr. Garris as the Libertarian, as well as the Republican, candidate on the general ballot. *Cf., Libertarian Party v. Eu,* 28 Cal.3d 535, 170 Cal.Rptr. 25 (1980) (applying "strict scrutiny," court found no violation of constitutional right to associate for political activity where independent candidate not designated as Libertarian on ballot).

Accordingly, and given all of the above, it is HEREBY ORDERED that:

1. Plaintiffs' motion for summary judgment is denied.

2. Defendant's motion to dismiss is granted. Alternatively, summary judgment is granted in favor of defendant.

3. This action is dismissed. All status conference and other dates in this action are vacated.

IT IS SO ORDERED.

DATED 10/15/80

/s/ Thelton E. Henderson
Judge Thelton E. Henderson
United States
District Court

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GAIL LIGHTFOOT; STEVE ALEXANDER; PAT MCHARGUE; ERIC GARRIS; ANN JUSTI; GEORGE OBRIEN; WAYNE NYGREN; RONALD RUBIDOUX; and LIBERTARIAN PARTY OF CALIFORNIA *Plaintiffs-Appellants,* v. MARCH FONG EU, Secretary of State of California, *Defendant-Appellee.*	No. 90-16680 D.C. No. CV-90-01750-TEH OPINION

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued and Submitted
February 11, 1992–San Francisco, California

Filed May 18, 1992

Before: Cynthia Holcomb Hall and Charles Wiggins, Circuit Judges and James M. Burns, District Judge.*

Opinion by Judge Hall; Concurrence by Judge Burns

*The Honorable James M. Burns, Senior United States District Judge for the District of Oregon, sitting by designation.

SUMMARY

Government Law/Elections

Affirming a district court judgment, the court of appeals held that California Elections Code section 6661(a) does not violate the first amendment association rights of the Libertarian Party of California.

Appellant Libertarian Party of California ("the Party") and several of its members sought an injunction ordering the California Secretary of State to place four of its members on the November 1990 California general election as the Libertarian candidates for various state and federal offices. Also sought was a declaratory judgment that California Elections Code sections 6653 and 6661(a) are unconstitutional under the first and fourteenth amendments to the Constitution. The Libertarian Party argued that section 6653, requiring political parties to nominate candidates by direct primary, and section 6661(a), requiring candidates to demonstrate some support among the electorate before they may appear on the general ballot, violates that party's freedom of association. The Libertarian Party chose to adopt its own requirements for nominating a write-in to represent it on the general ballot. Bylaw 15 purported to supersede California Election Code section 6661(a). There being vacancies of certain positions on the general ballot in November 1990, the Party nominated four of its candidates for those offices. Because this procedure violated section 6653, the Secretary of State refused to place the candidates on the general election ballot. Because the 1990 election was a thing of the past, the only issue for resolution was whether the district court properly denied

that party's request for declaratory relief. The district court dismissed the case and, in the alternative, granted summary judgment to the State.

While the Party characterizes its objection to section 6661(a) as infringing on its right to freedom of association, it is because in reality that section denies the Party access to the ballot. It does not infringe on the Party's right to adopt its own procedures for self-governance because it does not purport to regulate intraparty procedures. Section 6653, on the other hand, does not impede the Party's access to the ballot but simply denies access to political parties that fail to hold primaries. The court noted that *Socialist Workers Party*, one of the Supreme Court's most recent ballot-access cases, considered the effect on minor parties of a threshold similar to that of section 661(a), and concluded that it did not violate the parties' freedom of association. Despite the Party's claim to the contrary, it was not significant that it was impossible for any Libertarian write-in candidate to meet the 1% threshold in the 1988 primary. The small number of voters eligible to vote in the Libertarian primary was not an impediment created by the State of California. Thus, the burden section 6661(a) places on the Party's access to the ballot for the candidate of its choice is slight. Though the court concluded that the burden section 6661(a) places on the Party's associational rights is slight, it nevertheless evaluated the significance of the State's interest in requiring a 1% threshold of support for any party appearing on the general ballot. This state interest was significant enough to justify not only refusing to place a candidate on the ballot, but also refusing to designate a

candidate on the ballot as Libertarian. Because the burden imposed by section 6661(a) on the Party's freedom of association is slight, and because the State has a compelling interest in minimizing voter confusion, the court held that that section did not violate the Party's first amendment right to associate with whomever it chooses. For the same reasons that section 6661(a) places only a slight burden on the Party's access to the ballot, section 6653 also burdens that access only minimally. The court noted that the Party's challenge to section 6653 is less about ballot access than it is about the State's power to regulate the manner in which the Party governs itself and nominates its candidates. Therefore, the court held that the state's interest in enhancing the democratic character of the election process overrides whatever interest the Party has in designing its own rules for nominating candidates.

COUNSEL

Arlo Hale Smith, San Francisco, California, for the plaintiff-appellant.

Thomas P. Reilly, Deputy Attorney General, Oakland, California, for the defendant-appellee.

OPINION

HALL, Circuit Judge:

The Libertarian Party of California ("the Party"), its Chairman Gail Lightfoot, and several of its members sought an injunction ordering Secretary of State March

Fong Eu to place Pat McHargue, George O'Brien, Ronald Rubidoux, and Eric Garris on the ballot for the November 1990 California general election as the Libertarian candidates for various state and federal offices. They also sought a declaratory judgment that California Elections Code sections 6653 and 6661(a) are unconstitutional under the First and Fourteenth Amendments to the United States Constitution. The district court denied the Party's motion for summary judgment and granted the State's motion to dismiss or, in the alternative, for summary judgment.

The Party appeals the district court's order. It argues that section 6653, which requires political parties to nominate candidates by direct primary, and section 6661(a), which requires candidates to demonstrate a modicum of support among the electorate before they may appear on the general ballot, violate the Party's freedom of association. The 1990 election having receded into history, we obviously cannot enjoin the state from denying the Libertarian candidates a place on the 1990 ballot. The only issue before us, therefore, is whether the district court properly denied the Party's request for declaratory relief.

I

BACKGROUND

California elections Code section 6610 provides: "The person who receives the highest number of votes at a primary election as the candidate of a political party for nomination to an office is the nominee of that party at the ensuing general election." Cal. Elec. Code § 6610 (West 1977). A candidate is eligible to run in the primary if he

or she complies with certain formalities. *See id.* §§ 6490 *et seq.* A candidate who does not comply with these formalities, but whose name has been written in on the primary ballot and who receives more votes than any other candidate for the party's nomination, will be eligible to represent the party on the general ballot if he or she satisfies one of three prerequisites. The first of these is a requirement that the number of votes the candidate receives in the primary is "equal in number to 1 percent of all votes cast for the office at the last preceding general election at which the office was filled." Cal. Elec. Code § 6661(a) (West Supp. 1992).

In February 1980, the Libertarian Party, apparently unhappy with this rule, chose to adopt its own requirements for nominating a write-in to represent it on the general ballot. Libertarian Party Bylaw 15 permits the Party to nominate a write-in if: a) he or she receives more votes than anyone else for the party's nomination for that office; *and* b) the number of votes he or she receives in the primary is "equal to the number of signatures that he or she would have needed in order to have qualified to appear on the Party's primary ballot per California Elections Code section 6495."[1] Bylaw 15 purports to "supersede California Election Code section 6661(a)."

If a party fails to nominate a candidate through the primary process, it may not fill the resulting vacancy on

---

[1] California Elections Code section 6495 requires that a candidate obtain 40 signatures to appear on the primary ballot for election to the United States Congress or State Assembly and 65 signatures to appear on the ballot for election to statewide office. *See* Elec. Code § 6495(a) and (b) (West Supp. 1992)

the general ballot by other means, such as a nominating convention. California Elections Code § 6653 provides: "No vacancy on the ballot for a general election may be filled except if the candidate dies and that fact has been ascertained by the officer charged with the duty of printing the ballots at least 68 days before the next ensuing general election." *Id.* § 6653. Just as the Party adopted its own nominating qualifications for write-ins, the Party adopted its own process for nominating candidates, also in contravention of State law. Libertarian Party Bylaw 17 states that party nominations may be made either by primary election *or* by party convention.

In June 1990, California held a primary election. apparently no one competed in the Libertarian primary for the offices of United States Congressman for the 10th Congressional District, State Treasurer, and State Assemblyman for the 18th Assembly District. Consequently, there were vacancies for these positions on the general ballot, which the Party sought to fill via a post-primary nominating convention. The Party nominated Pat McHargue, George O'Brien, and Ronald Rubidoux as its respective candidates for those offices, pursuant to Bylaw 17. Because this procedure violated section 6653, Secretary Eu refused to place the candidates on the general election ballot.

Eric Garris ran in the Republican primary and was nominated as the Republican candidate for the 21st Assembly district. He appeared on the general election ballot as the Republican candidate for that office. Garris also wished to be the Libertarian candidate for the office, but under California Election Code § 6401, he was not

permitted to run in both primaries. *See id.* § 6401. Therefore, his only opportunity to be listed as the Libertarian party candidate on the general ballot was to qualify as a write-in. Unfortunately for the Party, though Garris polled more votes in the Libertarian primary than any other candidate, he failed to meet the 1% threshold and consequently Secretary Eu refused to identify him on the general ballot as the Libertarian Party candidate.

The party sought injunctions to place McHargue, O'Brien, Rubidoux, and Garris on the ballot and declaratory judgments that sections 6661(a) and 6653 violate the Party's First Amendment right to freedom of association. The district court dismissed the case and, in the alternative, granted summary judgment to the State.

II

DISCUSSION

Both parties take quite different approaches to analyzing the issues presented by this case. The Party argues that the case is "not a classic ballot access" case because as a "qualified party" under California law, it already has access to the ballot. Rather, the Party maintains, the case "involves a conflict between party rules and state law with respect to the procedures by which the Libertarian Party makes its nominations for the general election ballot." The State, on the other hand, argues that this is very much a ballot access case, albeit a slightly unconventional one. Each party is half right.

The party complains that section 6661(a) denied it the opportunity to nominate a write-in candidate for State

Assembly in this election because there was no assembly voting district in which there was a sufficient number of Libertarian voters to enable a Libertarian write-in to meet the 1% threshold. No matter how the Party characterizes its objection to section 6661(a), if that law infringes on freedom of association at all, it is because it denies the Party access to the ballot. It does not infringe on the Party's right to "adopt its own procedures for self-governance" because it does not purport to regulate intraparty procedures. And to say that the law infringes on the Party's ability to "nominate the standard bearers of [its] choice" is no different from saying that the law blocks access to the ballot for the Party's chosen candidate.

Section 6653, on the other hand, does not impede the Party's access to the ballot. To be sure, it denies access to political parties that fail to hold primaries. The real burden of the law, however, is that it usurps political parties power to determine for themselves the process by which they will take advantage of the access they are afforded; that is, the process by which they will nominate their candidates.

A

We must first resolve the parties dispute over the degree of scrutiny to which these laws should be subject. The Supreme Court's approach to election law cases has been to consider the extent to which the law in question infringes on a minor party's freedom of association and to balance that infringement against the state's alleged interest in the rule. *See Anderson v. Celebrezze*, 460 U.S. 780, 789 (1982); *Erum v. Cayetano*, 881 F.2d 689, 692 (9th

Cir. 1989). The Party contends that this is a strict scrutiny test requiring the State to demonstrate that the law is narrowly tailored to serve a compelling interest. In *Erum*, however, we concluded that although the Supreme Court has from time to time purported to employ strict scrutiny in these cases, "heightened scrutiny is not the rule and two of the Court's most recent cases seem to have abandoned that pretense altogether in favor of pure balancing." *Erum*, 881 F.2d at 692 n.7.

At the time *Erum* was decided, the Court's decisions regarding voting rights were in tension with each other on the question of scrutiny. *Compare Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989) (election laws that burden First Amendment rights must serve a "compelling state interest" and be "narrowly tailored to serve that interest") *and id.* at 233-34 (Stevens, J., concurring) (expressing discomfort with the Court's use of such tests) *with Munro v. Socialist Workers Party*, 479 U.S. 189, 193-94 (failing to articulate a standard of review) *and id.* at 201 (Marshall, J. dissenting) (noting this failure, describing it as a departure from the Court's prior ballot access cases employing strict scrutiny, and advocating continued adherence to that test).

The Court has resolved its ambivalence about this matter in *Norman v. Reed*, 112 S.Ct. 698 (1992), its most recent ballot-access case, which clearly held that any law impinging on a political party's access to the ballot will be subject to strict scrutiny. In *Norman*, the Court considered whether two Illinois Election laws, as construed by the Illinois Supreme Court, violated the Harold Washington Party's right to access the ballot. The Court set the

terms of its review in the unmistakable language of strict scrutiny:

> To the degree that a State would thwart this interest by limiting the access of new parties to the ballot, we have called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation, and we have accordingly required any severe restriction to be *narrowly drawn* to advance a state interest of *compelling importance.*

Id. at 705 (citation omitted) (emphasis added).

We conclude, therefore, that *Erum's* holding that strict scrutiny does not apply in ballot-access cases has been overruled by *Norman.* (*Please refer to Appendix C). It bears emphasizing, however, that unlike other areas in which strict scrutiny has been employed, its invocation in election law cases has not preordained their outcome. In fact, the Court has repeatedly stressed that there is no "litmus-paper test" for evaluating constitutional challenges to ballot-access restrictions. *See Socialist Workers Party,* 479 U.S. at 193 (quoting *Storer v. Brown,* 415 U.S. 724, 730 (1974)). With this admonition as our guide, we consider the constitutionality of California Election Code sections 6661(a) and 6653. We review a district court's grants of summary judgment de novo. *Kruso v. International Tel. & Tel. Corp.,* 872 F.2d 1416, 1421 (9th Cir. 1989).

B

The Party claims section 6661(a) seriously infringes on its ability to field candidates of its choice in general elections. Eric Garris ran in the 1990 Republican primary,

won, and was listed on the general ballot as the Republican candidate for State Assembly in the 21st Assembly District. Garris was a write-in candidate in the Libertarian primary and polled more votes than any other candidate. But Garris was unable to qualify as the Libertarian candidate on the general ballot because he did not meet the 1% threshold. Moreover, in May 1990, there was no State Assembly District in California containing a sufficient number of Libertarian voters to enable any Libertarian write-in candidate to meet the 1% threshold, even if he or she were to have obtained every single Libertarian vote in his or her district. We note that the Party's challenge to section 6661(a) arises in a somewhat unusual context because Garris did appear on the general ballot, albeit as the *Republican* candidate. Even though Garris was on the ballot, the Party complains that section 6661(a) infringed on its freedom to associate with him because it prevented Garris from being designated Libertarian.

Vote thresholds like that prescribed by section 6661(a) are quite common and have been reviewed on several occasions by the Supreme Court and the Ninth Circuit. *Socialist Workers Party,* one of the Court's most recent ballot-access cases, considered the effect on minor parties of a threshold similar to that of section 6661(a), and concluded that it did not violate the parties' freedom of association. The State of Washington would not include on the general election ballot any minor-party candidate who failed to receive at least 1% of all votes cast for that office in the primary. In a primary election held in 1983, the person who received the largest number of votes in the Socialist Workers Party primary fell just

short of meeting the 1% threshold and thus did not qualify for the general election ballot.

The Court began its analysis of the Washington law from the premise that "States may condition access to the general election ballot by a minor-party or independent candidate upon a showing of a modicum of support among the potential voters for the office." 479 U.S. at 19. It emphasized that Washington's restrictions actually placed a lighter burden on minor parties than those the Court had upheld in *Jenness v. Forston*, 403 U.S. 431 (1971) and *American Party of Tex. v. White*, 415 U.S. 767 (1974). The restrictions at issue in those cases prevented a minor party from obtaining access to *any* ballot if it did not demonstrate the requisite voter support. Washington's law, on the other hand, burdened only access to the general election ballot, while affording minor-party candidates "easy access to the primary election ballot and the opportunity for the candidate to wage a ballot-connected campaign." *Socialist Workers Party*, 479 U.S. at 199. Thus, the Court concluded, any burden the law placed on minor parties' First Amendment rights was "slight." *Id.*

Minor-party candidates in California have even greater access to the ballot than those in Washington. Like Washington, California provides easy access to the primary ballot. A candidate for State Assembly may run in a qualified minor party's primary simply by obtaining 40 signatures in support of his or her candidacy. Cal. Elec. Code § 6495(b) (West Supp. 1992). Unlike Washington, however, California places no additional obstacles between those candidates and the general election ballot except, of course, a requirement that they win their party's primary. Those who do are automatically placed

on the general election ballot no matter how few votes they receive. Only write-in candidates must satisfy the 1% threshold. California law, therefore, offers even greater access to the ballot than did the Washington law upheld in *Socialist Workers Party*. *See* 479 U.S. at 191.

Despite the Party's claim to the contrary, it is not significant that it was impossible for any Libertarian write-in candidate to meet the 1% threshold in the 1988 primary. In *Socialist Workers Party*, the Party argued that the total pool of primary voters was so small that it would be quite difficult for it to meet the 1% threshold. The court rejected this argument on the ground that voter apathy was not an impediment created by the State of Washington. *See id.* at 198. Likewise, the small number of voters eligible to vote in the Libertarian primary is not an impediment created by the State of California. The Libertarian Party could broaden the number of voters that participate in its primary by opening its currently closed primary to non-Libertarians, and the State could not prevent it from doing so. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986) (holding that state law requiring that voters in party primary be registered members of the party violates First Amendment right to freedom of association). If, as the Party contends, it is unwilling to open its primary, it may broaden its voter base by increasing its membership. If it is unable to do so because its message is not attractive to a large number of voters, that is not the fault of the State. We conclude that, as a general matter, the burden section 6661(a) places on the Party's access to the ballot for the candidate of its choice is slight.

But the Party contends that section 6661(a) imposes a unique burden in this case because the Party wanted to nominate a candidate who ran in another Party's primary. Because Garris ran in the Republican primary, he could not run in the Libertarian primary. Therefore, his only opportunity to be listed as the Libertarian party candidate on the general ballot was to qualify as a write-in. The Party has not challenged the State's prohibition on cross-filing. It challenges only the way section 6661(a) operates to prevent it from listing Garris as the Libertarian candidate on the general election ballot.

The Libertarian Party presented essentially the same argument to the California Supreme Court over a decade ago, before it was a qualified party in California. In *Libertarian Party of Cal. v. Eu*, 620 P.2d 612 (Cal. 1980), the Supreme Court considered whether the Party had a First Amendment right to have two independent candidates designated as Libertarian candidates on the general election ballot. The two candidates qualified to appear on the ballot as "Independent" candidates, but because the Libertarian Party was not a "qualified party" under California law, the Secretary refused to designate the candidates as "Libertarian." The court found that California Election Code section 10210, which required candidates who qualified "by virtue of an independent nomination" to be designated as "Independent," rather than as a member of a political party, did not violate the Party's freedom of association. *Id.* at 618. It concluded, correctly, that the Party was "in no way restricted in its associational activities or in its publication of the affiliation of its candidates." *Id.* at 617.

The ascension of the Libertarian Party of California to political legitimacy does not render the reasoning of the California Supreme Court any less persuasive than it was ten years ago. Because Garris was on the general ballot, the Party was free to associate with him in every way that counts. The party was free to publicly endorse Garris and Party members were free to vote for him. Therefore, the burden placed on the Party's associational rights by the proscription against designating its affiliation with Garris on the ballot was slight.

Though we conclude that the burden section 6661(a) places on the Party's associational rights is slight, we must nevertheless evaluate the significance of the State's interest. The State suggests that its interest in requiring the 1% threshold is to ensure that any candidate appearing on the general ballot has demonstrated a "modicum of support." In *Jenness*, the Supreme Court first recognized that "[t]here is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot – the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." 403 U.S. at 442. The court has reaffirmed that principle on several occasions, most recently in *Socialist Workers Party*. *See* 479 U.S. at 194.

The State's interest in requiring that a candidate demonstrate a modicum of support is significant enough to justify not only refusing to place a candidate on the ballot, but also refusing to designate a candidate on the ballot as Libertarian. In the latter case, the 1% threshold

serves to avoid voter confusion by requiring that a candidate have sufficient support from within a party before his or her name will be associated with that party on the ballot. It is true that even if Garris had received 100% of the Libertarian vote in that primary, he could not have appeared on the ballot as the Libertarian candidate. But without the 1% threshold, the State would have to designate Garris as the Libertarian candidate even if he had obtained but one write-in vote, so long as no other candidate received more than one vote. In such a circumstance, designating Garris as the candidate of the Libertarian Party would be likely to mislead voters about the degree of Libertarian support Garris enjoyed.

Because the burden imposed by section 6661(a) on the Party's freedom of association is slight, and because the State has a compelling interest in minimizing voter confusion, we hold that section 6661(a) does not violate the Party's First Amendment right to associate with whomever it chooses. The Party's assertion that "legislative restrictions on the right of a ballot-qualified political party to adopt its own procedures for self-governance including nomination of candidates constitute a substantial impairment of the rights of the party and its members to freedom of association" does find some support in the Supreme Court's jurisprudence, but the Party overstates the breadth of the holdings on which it relies. *See San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (holding that California election laws forbidding political parties from endorsing candidates in party primaries and dictating organization and composition of party governing bodies violate right to freedom of association); *Republican Party of Conn.*, 479 U.S. 208 (holding that state law

requiring that voters in party primary be registered members of the party violates right to freedom of association); *Democratic Party of U.S. v. Wisconsin*, 450 U.S. 107 (1981) (holding that Wisconsin could hold an open Democratic primary but could not require the *National* Party to accept the results of that primary, which conflicted with National Party rule requiring closed primaries). These cases struck down particularly egregious intrusions into party self-governance. *Jenness*, *American Party*, and *Socialist Workers Party* are on all fours with this case and demonstrate that political parties' rights to nominate whomever they want, however they want, is not sacred.

C

For the same reasons that section 6661(a) places only a slight burden on the Party's access to the ballot, section 6653 also burdens that access only minimally. First, section 6653 places no burden on access to the primary ballot; it impedes only access to the general election ballot. *See Socialist Workers Party*, 479 U.S. at 199 (law that provides "easy access to primary election ballot and the opportunity for the candidate to wage a ballot-connected campaign" burdens constitutional rights only slightly). Second, whatever burden section 6653 does place on access to the general ballot is negligible. O'Brien could have appeared on the primary ballot had he obtained 65 signatures supporting his candidacy. McHargue and Rubidoux could have appeared had they obtained 40 signatures. *See* Cal. Elec. Code § 6495 (West Supp. 1992). Once these men obtained places on the primary ballot, there was no obstacle preventing the Party from voting them onto the general ballot.

But the Party's challenge to section 6653 is less about ballot access than it is about the State's power to regulate the manner in which the Party governs itself; specifically, how it goes about nominating its candidates. The Supreme Court has noted that rules governing a political party's internal affairs "directly implicate the associational rights" of the party and its members. *San Francisco County Democratic Cent. Comm.*, 489 U.S. at 229; *see also Republican Party of Conn.*, 479 U.S. at 224 (political party's "determination . . . of the structure which best allows it to pursue its political goals, is protected by the Constitution"). Thus, section 6653, which attempts to directly regulate the internal affairs of the Party, imposes a heavier burden on the Party's freedom of association than does section 6661(a), which burdens the Party's access to the ballot ever so slightly.

Though the Court has recognized that rules governing political parties' internal affairs impose a significant burden on those parties, it has suggested that the states' power to regulate the nominating process is beyond dispute. In rejecting an equal protection challenge to a Texas law that required minor parties to nominate candidates by convention and major parties to nominate by primary, the Supreme Court recognized that the law did not infringe on the freedom of association. "It is too plain for argument . . . that the State . . . may insist that intraparty competition be settled before the general election by primary election or by party convention." *American Party of Tex.*, 415 U.S. at 781; *see also Republican Party of Conn.*, 479 U.S. at 237 (Scalia, J., dissenting) (state is not "bound to honor a party's democratically expressed desire that its candidates henceforth be selected by convention rather

than by primary"). While the Court has issued this dictum suggesting that a state categorically has the power to determine the method by which a party nominates a candidate, neither it, nor any federal court that we are aware of has actually decided the question. We therefore face the issue as one of first impression.

The State justifies the direct primary requirement as a Progressive Era reform designed "to take political nominations out of the smoke-filled rooms of party bosses and give them to the voters." The direct primary was one of several measures conceived of by the Progressives to destroy what they viewed as "the corrupt alliance" between wealthy special interests and the political machine. Richard Hofstadter, *The Age of Reform* 257 (Vintage books 1955). The Progressives believed democracy should be something greater than competition between political parties. *Id.* at 263. They viewed the direct primary as a vital weapon in their battle to "make government accessible to the superior disinterestedness and honesty of the average citizen. Then, with the power of the bosses broken or crippled, it would be possible to check the incursions of the interests upon the welfare of the people and realize a cleaner, more efficient government." *Id.* at 257. We can imagine no government interest more compelling. Though honest people may debate the success of the direct primary in producing the kind of government the Progressives envisioned, it is a means sufficiently tailored to its ends to satisfy the Constitution. Indeed, if the goal of California's Progressive reformers was to deliver power over the political process from the hands of party bosses and special interests into those of the people, no measure short of the direct primary would

be adequate. We therefore hold that the State's interest in enhancing the democratic character of the election process overrides whatever interest the Party has in designing its own rules for nominating candidates.[2]

CONCLUSION

The party system has been a prominent and long-standing, if not always exalted, feature of our democracy. Ensuring the freedom of individuals to form political associations with whomever they choose lies at the very heart of the First Amendment. The state must proceed with great caution when it acts in ways that undermine the ability of individuals to form those organizations or deny them the power to run those organizations, once formed, as they choose.

But the state is not powerless to act. Turning the entire electoral apparatus over to political parties would pose as great a threat to the integrity of our system of government as would the state's unprincipled meddling in the political process. This recognition informs the Supreme Court's direction to lower courts to strike a balance between the interests of the parties and those of the state that will best enhance the democratic character of our system.

---

[2] Our holding should not be read to imply that a state could not demonstrate a compelling interest in requiring political parties to nominate candidates via convention. A state might conclude, for instance, that nominating conventions produce more qualified candidates than do primaries and as a consequence produce better government. Since the question is not before us, we express no view on its merits.

We conclude that the balance is best struck by permitting California to require that write-in candidates demonstrate a modicum of support before they will be granted a berth on the general ballot, and that parties nominate candidates by direct primary rather than convention. Therefore, we hold that sections 6653 and 6661(a) of the California Elections Code do not violate the First Amendment right of California political parties to associate with whomever they choose. The judgment of the district court is AFFIRMED.

BURNS, Senior District Judge, concurs in the result.

APPENDIX C

The Ninth Circuits' Opinion of July 6, 1992 is exactly the same as its opinion of May 18, 1992 Except for the addition of this footnote:

> Since this opinion was originally filed, the Supreme Court has further clarified its position on the level of scrutiny it will apply to election laws. It now appears that we were wrong to conclude that *Norman* (in italics) stood for the proposition that laws that burden voting rights should always be subject to strict scrutiny and that it consequently overruled *Erum* (Erum in italics). in *Burdick v. Takushi*, ___ U.S. ___, 112, S.Ct. 2059 (1992), the Court stated that it will evaluate these laws under a "flexible" balancing test, according to which "the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Id.* at 2063. If a regulation imposes "severe" restrictions on voting rights, it will be subject to "strict scrutiny". But if the regulation "imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the state's important regulatory interests are generally sufficient to justify the restrictions." *Id.* at 2063-64 (quoting *Anderson*, 460 U.S. at 788-89, n.9, 103 S.Ct. at 1569-70, n.9). As we have found that Cal. Elec. Code sec. 6653 and 6661(a) withstand even the most rigorous scrutiny, *Burdick* has no impact on our holding that these laws are constitutional.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GAIL LIGHTFOOT; STEVE ALEXANDER; PAT McHARGUE; ERIC GARRIS; ANN JUSTI; GEORGE O'BRIEN; WAYNE NYGREN; RONALD RUBIDOUX; and LIBERTARIAN PARTY OF CALIFORNIA, Plaintiffs-Appellants, v. MARCH FONG EU, Secretary of State of California, Defendant-Appellee.	No. 90-16680 D.C. No. CV-90-01750-TEH ORDER (Filed Sep. 23, 1992)

Before: HALL and WIGGINS, Circuit Judges, BURNS*

The panel has voted to deny appellant's petition for rehearing filed June 1, 1992, and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

---

*The Honorable James M. Burns, Senior United States District Judge for the District of Oregon, sitting by designation.

APPENDIX E

Constitutional and Statutory Provisions

1. Amendment I of the U.S. Constitution provides:

Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. Amendment XIV of the U.S. Constitution provides:

No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. California Election Code Sec. 54 provides:

A plurality of the votes given at any election shall constitute a choice where not otherwise directed in the Constitution. . . .

4. California Election Code Sec. 6401 provides:

No declaration of candidacy for a partisan office . . . shall be filed, by a candidate, unless (1) at the time of presentation of the declaration and continuously for not less than three months immediately prior to that time, or for so long as he has been eligible to register to vote in this state, the candidate is shown by his affidavit of registration to be affiliated with the political party the nomination of which he seeks, and (2) the candidate has not been registered as affiliated with a qualified political

party other than the nomination of which he seeks within 12 months. . . .

5. California Election Code sec. 6495 provides:

The number of signers to a nomination paper required for the respective offices are as follows:

(a) State office of United States Senate, not less than 65 nor more than 100.

(b) House of Representatives in Congress, State Senate or Assembly, Board of Equalization, or any office voted for in more than one county, and not statewide, not less than 40 nor more than 60.

* * *

(d) When any political party has less than 50 voters in the state or in the county or district in which the election is to be held, one-tenth the number of voters of the party.

6. California Election Code sec. 6651.5 provides:

Any person nominated by the party at the direct primary election for a partisan office may be appointed to fill a vacancy on the general election ballot for any other partisan office, as provided in Section 6655, and in such case his appointment shall constitute a vacancy on the general election ballot for the office for which he was nominated. The vacancy thus arising shall be filled in the manner prescribed in Section 6655.

7. California Election Code Sec. 6653 provides:

No vacancy on the ballot for a general election shall be filled except by reason of the death of a candidate

occurring at least 59 days before the date of the next ensuing general election.

8. California Election Code sec. 6654 provides:

Whenever a candidate for nomination for a partisan office at a primary election dies on or before the day of the election and a sufficient number of ballots are marked as being voted for him to entitle him to nomination if he had lived until after the election, a vacancy exists on the general election ballot which shall be filled in the manner provided in Section 6655 for filling a vacancy caused by the death of a candidate.

9. California Election Code sec. 6657 provides:

A vacancy authorized to be filled because of the death of a candidate shall be filled, and the name of the person named to fill the vacancy shall be certified to the election officer charged with the duty of printing the ballots 59 days before the day of the election.

10. California Election Code section 6661 provides:

No person whose name has been written in upon a ballot for an office at the direct primary election may have his or her name placed upon the ballot as a candidate for that office for the ensuing general election unless one of the following statements is true:

(a) At that direct primary he or she received for that office votes equal in number to 1 percent of all votes case for the office at the last preceding general election at which the office was filled.

11. California Election Code section 7300 provides:

Every person who desires to be a write-in candidate and have his or her name as written on the ballot of an election counted for a particular office shall file:

* * *

(b) The requisite number of signatures on the nomination papers, if any, required pursuant to Section /___/ 6495. . . .

12. California Elections Code section 17102 provides:

Every voter shall be entitled to write in the name of any candidate for any public office . . . on the ballot of any election.

APPENDIX F

LIBERTARIAN PARTY BYLAW 17

BYLAW 17: Nomination for Partisan Public Office

Sec. 1: Party nominations for partisan public office may be made by primary elections, in accordance with Div 6 of the California Election Code and Bylaw 15 of these Bylaws.

Sec. 2: Party nominations for partisan office may also be made by Party Convention, subject to these limitations:

A. The nominations by convention procedure only applies to regularly scheduled partisan elections, not special elections;

B. The nomination by convention procedure can only be used for an office for which no candidate was received the Party's nomination in the Party's immediately preceding primary;

C. No more than one nomination per office can ever be made in any particular election; and

D. All nominations must be made within 60 days after the primary election of any even numbered year.

Sec. 3: The decision as to whether the party wishes to hold a statewide nominating convention shall be made by the Executive Committee at its nearest practical meeting within each even numbered year. Only one statewide nominating convention may be held in any calendar year.

Sec. 4: Unless a statewide nominating convention is being conducted at the party's regular state convention,

no business may be conducted at the statewide nominating convention other than the nomination of partisan statewide candidates for public office.

Sec. 5: Statewide conventions held solely to nominate candidates for partisan public office shall be governed by Bylaws 16 (section 1 & 2) and 19, except that only 30 days notice must be provided to the membership of the State Central Committee. The Convention Rules apply to a statewide convention held solely to nominate candidates for partisan public office. Convention Rule 17 applies to the nomination procedure.

Sec. 6: It shall be the responsibility of the Executive Committee to determine which Regional and County Party Organizations shall be granted the authority to make convention nominations for particular Congressional, legislative and Board of Equalization seats.

Sec. 7: The Executive Committee may not grant the authority to any Regional or County Party Organization to make convention nominations for Congress, State Legislature and/or State Board of Organization to make convention nominations for Congress, State Legislature and/or State Board of Equalization unless there is a substantial overlap between the geographical territory of the particular Congressional, State Legislative, or Board of Equalization district, and the geographical territory of the Regional or County Party Organization.

Sec. 8: The Executive Committee must determine which Regional and County Party Organizations have responsibility for making particular convention nominations for Congress, State Legislature and Board of Equalization no later than 30 days prior to the Primary Election of any

even numbered year, and shall provide that Libertarian Party members may participate in the convention process in their respective district. The Executive Committee shall ensure that notice of the nomination convention at the state or local level shall be by method calculated to give notice to Libertarian Party members, such as publication of notice of the convention in a newspaper of general circulation in the affected area, at least 30 days prior to the date of the convention.

Sec. 9: Regional and County Party Organizations shall be responsible for preparing their own rules governing partisan nominations for Congress, State Legislature and Board of Equalization, but such rules must provide for advance notice of at least 30 days to all members of the Regional and County Central Committee members, of the time and place of conventions called for nominating candidates for Congress, State Legislature, and/or Board of Equalization.

Sec. 10: The Chair shall forward a list of all candidates nominated in convention to the Secretary of State no later than 75 days after the primary election of any even-numbered year.

APPENDIX G
LIBERTARIAN PARTY BYLAW 15

BYLAW 15: Write-in Votes for Partisan Office

A person seeking the Party nomination for a partisan office by write-in votes in the direct primary election shall be deemed nominated an shall have his or her name printed on the general election ballot as Libertarian Party nominee if both the following conditions are met:

A. He or she receives more votes than anyone else for the Libertarian Party's nomination for that office.

B. He or she receives a total number of votes in the Libertarian Party direct primary election for that office equal to the number of signatures that he or she would have needed in order to have qualified to appear on the Party's primary ballot per California Election Code section 6495. This bylaw shall supersede California Election Code section 6661(a) for Libertarian Party direct primary nominations by write-in votes.